

Great Plains Beef Company and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Cases 18-CA-4910, 18-CA-5005, and 18-CA-5042

May 11, 1981

SUPPLEMENTAL DECISION AND ORDER

On November 24, 1980, Administrative Law Judge David L. Evans issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Charging Party filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Great Plains Beef Company, Council Bluffs, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

¹ We find in agreement with the Administrative Law Judge that Willard Cook is entitled to the sum of \$2,837, plus interest. However, in adopting the Administrative Law Judge's finding denying backpay to Ferman D. Trotter, we note especially that the record shows that Trotter was an evasive witness; that he denied that he received an hourly wage from Amalgamated Meat Cutters, District Union 271, until he was reminded at the hearing that he received money from such union for engaging in picketing; that his W-2 forms indicated that he received \$1,232 from the Union in 1976 and \$378 in 1977; that he was deceptive in his recordkeeping, which did not contain a reference to wages received for picketing; and that following his admission at the hearing that he earned money while picketing, he further stated that he did not know nor could he recall what other information he had failed to supply the Board, and also did not know whether he would have disclosed his earnings from picketing had the matter not been called to his attention at the hearing. In view of Trotter's testimony, we find in agreement with the Administrative Law Judge that Trotter's deception, evasiveness, and concealment of interim earnings constitutes an abuse of the Board's processes and that his failure or refusal to recall what other information he failed to supply the Board renders ascertainment of Trotter's interim earnings impossible.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: On April 18, 1979, the National Labor Relations Board issued its Decision and Order (241 NLRB 948), directing Respondent, *inter alia*, to take certain affirmative action to remedy the unfair labor practices therein found, including reinstatement of unlawfully discharged employees Willard D. Cook and Ferman D. Trotter and payment to them of backpay. Thereafter, on September 6,

255 NLRB No. 185

1979, the United States Court of Appeals for the Eighth Circuit entered its consent judgment enforcing in full the backpay provisions of the Board's Order. The present controversy concerns the amount of backpay, if any, due to Cook and Trotter under the terms of the Board's Order, as enforced.

Hearing in this matter was held before me in Council Bluffs, Iowa, on June 2, 1980. Thereafter, the General Counsel and Respondent filed briefs which have been fully considered.

Upon the entire record in the case, and from my observations of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

A. Willard D. Cook

As alleged by the backpay specification, Cook's backpay period extends from June 2, 1976, when he was discharged, through September 27, 1976, when he was reinstated by Respondent. The specification seeks \$2,837, plus interest, as backpay due and owing Cook pursuant to the Board and court Orders. Respondent does not dispute the General Counsel's method of computation, but it urges that Cook is entitled to nothing because he did not make a reasonable effort to secure substantially equivalent employment after his discharge.

At all times material, Cook lived in Glenwood, Iowa, a distance of about 25 miles from Respondent's plant in Council Bluffs. When employed by Respondent, Cook was a head boner or templar. He had been hired on March 29, 1976,¹ by Respondent at a time when he had no experience in the meat-packing industry. During his brief tenure of employment, he received regularly scheduled wage increases and no negative criticisms of his work by Respondent. After his discharge, Cook did nothing to seek employment until sometime during the second week when he applied at the pork plant of Swift in the Glenwood, Iowa, area. Cook testified that he applied for any job he could get there, but was refused employment by Swift. When asked why he did not apply at any of the several meat-packing plants in the Council Bluffs-Omaha area, Cook testified that he did not at the time feel he had enough experience to qualify for employment at those plants. The short answer to this is, of course, that Cook had no experience at all when hired by Respondent and there is no reason to believe that Respondent's standards are in any way lower than those of other packing plants in the area. Because of this failure to apply for work at other Omaha-Council Bluffs packing plants, Respondent argues that it has been shown that Cook has failed to make a reasonable search for work. However, there is no evidence that, had he applied at other area packing plants, Cook would have been successful in securing a job as a templar or anything else. Respondent did call one Virgil Eades to give testimony on the issue. Eades testified that during the summer of 1976 he was on the corporate staff of Flavorland Industries, a packing plant in the area. Eades made an attempt to paint a picture of a steady demand for

¹ See 241 NLRB 948, *supra* at 962.

head templars, luggers, and other jobs in area packing houses during that period. This testimony was entirely generalized and conclusionary and certainly did not prove that there were any actual openings into which Cook would have been placed had he applied. In fact, when asked how many employees were hired by Flavorland during the period in question, Eades testified that he did not know. If Respondent had gained knowledge that any employees were hired by any of the packing plants in the area, especially Flavorland, it presumably would have presented evidence thereof rather than relying on the generalized, conclusionary, and incredible testimony of Eades. The burden of showing that there was employment which Cook would have been successful in securing is upon Respondent and I find that it has failed to meet this burden. *Champa Linen Service Company*, 222 NLRB 940 (1976), and cases cited therein at 942.

Respondent's second contention regarding Cook is that he incurred a willful loss of earnings by accepting employment, on July 22, 1976, at the Glenwood State Hospital at a rate of \$3.50 per hour while he could have been working at a meat packing plant in the Council Bluffs area at approximately \$6 an hour, if he had applied at one which had a contract with the Union. Again, this contention relies on Respondent's unsupported assertion that there were jobs available for Cook at meat packing plants in the Council Bluffs area which he would have been given had he applied. Again, there is no evidence other than the discredited testimony of Eades that such jobs were available. Moreover, there is no burden upon employees to hold out indefinitely for the appearance of substantially equivalent employment as Respondent's brief strongly implies. Employees in need of work frequently are required to accept, at least for some time, lower paying jobs simply "to keep the wolves away from the door." Moreover, the pay differential from what he actually had been making when discharged (especially when offset by the reduced commuting cost since Cook did not have to make a 50-mile round trip daily to the job in Glenwood) is insufficient to require the conclusion that Cook, by taking a lower paying job, incurred unreasonably a willful loss of earnings.

Immediately after being discharged, Cook went to the Council Bluffs unemployment office to seek work. Additionally, as noted, during the second week, he applied at the Swift's pork plant in Glenwood, Iowa. He testified that he went to the Council Bluffs unemployment office a total of three times and to the Glenwood unemployment office more than that "because it was right next door." Cook also applied for work at a gas station and a hotel in the Glenwood area. He also consulted friends and local newspapers. I find that this is a reasonable diligent search for work during the June 2 to July 22, 1976, period in which Cook was unemployed as a result of the unlawful discrimination against him by Respondent. *Vanguard Oil and Service, Inc., et al.*, 246 NLRB 130 (1979).

Accordingly, I find and conclude that, as alleged, Wilard Cook is entitled to payment by Respondent of the sum of \$2,837, plus interest thereupon accrued to the

date of such payment,² less tax withholdings required by state and Federal laws.

B. Ferman D. Trotter

The backpay specification originally sought \$10,309 in net backpay for Trotter for the period April 2, 1976, when he was unlawfully discharged to September 11, 1978, when he declined reinstatement. The threshold issue in Trotter's case is whether he is entitled to any money because of intentional withholding of his interim earnings.³ In consideration of this issue I shall quote extensively from Trotter's testimony. Jim Miller, referred to herein, is the Regional Office agent assigned to secure all relevant information included in the backpay specification. The reference to "GC-2" therein is of a log Trotter claims to have maintained on a daily basis listing his search for work. This exhibit listed two jobs secured⁴ and omitted two others. The first omitted job was at Flavorland Industries from July 2 until July 25, 1976. Trotter had obviously told the General Counsel about this employment as it was included in the backpay specification. The other omitted job was employment by the Union which was the picketing of a grocery store in Council Bluffs. As the testimony reflects, this employment was not disclosed to the General Counsel at any time before the hearing. Trotter's testimony on cross-examination regarding this employment with the Union is as follows:

Q. How long was it before you obtained your first job?

A. I believe it was, now the month I am not sure, but I know my first job was at Flavorland Industries and it was part-time as a spot worker and I was looking for full-time employment, but the only thing I could get at that time was I got a week or two of vacationing peoples jobs. I filled in for them.

Q. You sat here and listened to Mr. Eads [sic] testimony a few moments ago?

A. Yes, sir, I did.

Q. And you applied and obtained a job there at that same south Omaha plant that he was talking about?

A. Yes, sir, I did.

Q. When did you do that?

A. I believe it was in July.

Q. And that was the first employment that you had since your April discharge?

² See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962); *Florida Steel Corporation*, 231 NLRB 651 (1977).

³ A second issue raised at the hearing was whether \$8,807.14 should be offset against his claim because Trotter received that sum as settlement of a Sec. 301 action for actual and punitive damages against Respondent for an alleged conspiracy to cause Trotter and others to be discharged. In view of my determination herein, that issue is rendered moot.

⁴ One of these three jobs was at Lackawanna Leather. Trotter claims to have been discharged from this job because his car broke down and he could not afford to fix it. I find it unlikely to the point of disbelief that he was discharged because his car broke down. It could have been that Trotter was fired for poor attendance caused by lack of transportation, or he may have quit voluntarily because of poor transportation, but the matter was not pursued. I mention it only for the purpose of illustrating Trotter's credibility.

A. I believe so.

Q. You say you believe so, is it so?

A. Yes, it is, yes, sir.

Q. And you can think of no other employment?

A. Not up to that time, no, sir.

Q. And according to the backpay specification, after Flavorland you worked at Lackawanna Leather?

A. Yes, I did.

Q. And then Union Packing?

A. Yes, sir, I did, I am still at Union Packing.

Q. So, then, the period that we are talking about was Flavorland Industries, Lackawanna Leather and then Union Packing?

A. Yes, sir.

Q. That is three employers?

A. Yes, sir.

Q. Were there any other employers?

A. No.

Q. I would like to ask you the question again; before you answer that I would like you to think very hard, if there were any other employers that you may have forgotten to tell us about?

A. I do not recall of any.

* * * * *

Q. How about this, when you talked to the Federal Agents about your backpay, about other earnings that you had, other jobs, didn't they ask you questions where you were working, ask you to sign forms, things like that?

A. I told you the only place I worked which I just testified to—

JUDGE EVANS (interrupting): No, no, sir, that is not the question.

He said; did the Board Agents, the people from Minneapolis, did they ask you if you had been working at places?

THE WITNESS: I would imagine they did.

JUDGE EVANS: You do not recall whether they asked you that or not?

THE WITNESS: Those meetings have been a long time ago and I do not remember everything that was said at those meetings, I do not remember who the people were, if you want to know the truth.

JUDGE EVANS: Now, answer my question; you do not recall whether they asked you whether you were working someplace?

THE WITNESS: I would imagine they did, but I do not recall, no.

JUDGE EVANS: Next question.

Q. (By Mr. Carey) Do you recall the Federal Agents telling you that it is important to keep a record of where you were working and how much you were earning, do you recall that kind of conversation?

A. I recall, telling me to keep a record of where I looked for work.

Q. And from that of course it follows that if you got work where you looked for it, you tell [sic] them that too?

A. Yes.

Q. They told you that, didn't they?

A. If you find a job, why, sure.

Q. Tell us, right, they said if you found a job, tell us?

A. Right.

Q. And did they tell you that some day they [sic] have to appear as a witness in the case if there was a disagreement with respect to how much the pay is?

A. Yes, I believe so.

Q. They told you that?

A. Sure.

Q. Did they tell you that it was important not to withhold anything from them?

A. Yes.

Q. Do you remember that one, don't you, you remember them telling you that, don't you?

Your answer is still yes, isn't it?

A. I guess so.

Q. Did you withhold anything from anybody in the Regional Directors [sic] Office about your employment?

A. No.

* * * * *

Q. Now, in 1976, did you in fact work for another employer that is not on this list [the specification]?

A. Not that I recall.

Q. Did you ever do any work for Local 271?

A. What do you mean by "work"?

Q. Perform a service for an hourly wage?

A. No.

Q. Work, you never did that?

JUDGE EVANS: Is your answer yes or no?

THE WITNESS: No.

JUDGE EVANS: The answer is no.

Next question.

Q. Did you ever do any picket duty for Local 271, at the rate of \$4.00 an hour?

Did that refresh your recollection?

A. Yes. I had pulled some picket duty and—

Q. And they paid you for it, did they not?

A. I believe so.

Q. Is that work to you, sir?

A. I guess it would be.

Q. You got paid for it, did you not?

A. Yes, sir.

Q. Yet you did not tell the people from the Regional Director's Office that, did you?

They asked you and you did not tell them, is that not right?

A. I must have forgot it.

Q. Did you forget the others, Mr. Trotter?

A. No, sir.

Q. How long did you work for Local 271?

A. I do not recall that either.

Q. You have no recollection?

A. No.

Q. How much did they pay you?

A. I do not remember.

Q. When I suggested \$4 an hour before, you said yes.

A. I do not know. I do not remember. It has been too long ago.

Q. Is four years really that long for you?

A. It seems to me, yes, sir.

Q. If they paid \$20 an hour, would you remember that, Mr. Trotter?

A. I do not know.

* * * * *

Q. As you sit here today, Mr. Trotter, are you able to tell us with any estimation how much money you earned working for Local 271?

A. No, sir.

Q. You cannot tell us any amount?

A. No.

Q. How frequently did they pay you, sir?

JUDGE EVANS: That is, how often did they pay you?

A. Probably once a week, I would guess. I do not know. I believe it was.

Q. Pardon?

A. I believe it was once a week.

Q. They pay you a check with Local 271 on the top of it?

A. This I do not remember what the check said.

Q. But it was a check, was it not?

A. I believe so.

Q. They did not pay you cash, did they?

A. No.

* * * * *

Q. Please look at Page 2 of GC-2. Is there any references there to a job that you obtain at Flavorland on that date?

A. No, sir. There is not.

Q. So that is left out, is it not?

A. Yes, sir.

Q. My question now is: What else did you leave out of GC-2?

A. I do not know; nothing, that I recall.

Q. You do not know if you left anything out?

A. No.

Q. How about the job with the Amalgamated? That is not anywhere recorded on the pages, is it?

A. No.

Q. But you have a very good memory as you sit here today of working for Amalgamated?

A. Yes.

Q. Because it is the first time in your life you ever did that kind of work, is that not true?

A. What do you mean by "the first time in my life"? That I ever worked a picket line, is that what you are trying to say?

Q. That is not the question.

That is the first time you ever obtained a job with a union, is that not true?

Yes or no, Mr. Trotter.

A. I guess it would be.

Q. It would be or it is not?

A. I guess it is.

Q. You guessed. Can you tell us without guessing?

A. Yes.

Q. Your answer is yes, that it is the first time in your life you ever got a job for a union, is that the answer?

Is that the answer?

Would you listen to me for a minute?

JUDGE EVANS: Wait. He is asking you: Is that the first time you ever got a job with the union?

THE WITNESS: Yes.

JUDGE EVANS: Next question.

* * * * *

Q. How long did this job with the union take?

A. Not very long. I just worked there enough to help me, so I could look for a good job.

Q. Enough to help you so you could look for a job?

A. Yes, a regular union job, like a packing house job, like I would have been in for the last ten or twelve years.

* * * * *

Q. (By Mr. Carey) Now, Mr. Trotter, the officials of Local 271 never told you that you did not have to report the wages they paid you as part of your income, did they?

A. They never told me what?

Q. They never told you that you did not have to report your income for that job with that union, did they?

A. No.

Q. You just took it upon yourself not to do so, did you not?

Yes or no?

A. Yes, sir, I guess I did.

Q. They also never told you, "Here is a gift, Trotter. We like you. Here is a gift"? Every time they paid you, they did not tell you that, did they?

Yes or no, Mr. Trotter?

A. No, sir.

Q. And when you made this record for Jim Miller, you did not tell him either, did you?

A. No, sir.

Q. GC-2, but you knew very well that you were performing that service and getting that money, and still you did not tell Miller, did you?

A. No, sir.

Q. And you did not intend to tell him, did you?

A. I forgot about it.

Q. Did you intend to tell him?

A. I do not know. I could have. I do not know if I would have. I do not know if I would have or would have not.

Q. Your earlier testimony is that you have no idea how much money they paid you, is that still your testimony?

MS. LAGAARO: I object. Who is "they"?

JUDGE EVANS: It is clear from the context that he is talking about the union. You understand that. Do you know how much money you got from the union for picket line duty?

THE WITNESS: No, I do not.

JUDGE EVANS: Next question.

Q. Would it help if you stopped to think a bit about the subject of money from the union so that you could exhaust your recollection as to how much money they paid you?

A. I would not have no idea, sir.

Q. No matter what we did, you still would not know?

A. No, I would not.

Q. Could it be as much as \$10,300?

A. I do not believe so.

Q. You do not believe so?

JUDGE EVANS: Mr. Trotter, if you got \$10,300 for picketing, do you not think you would remember it?

THE WITNESS: I do not recall getting that much, no. No, sir, I do not.

MR. CAREY: That is not Your Honor's question.

JUDGE EVANS: This is not my question. Would you not remember that?

THE WITNESS: If I got \$10,000 handed to me, I would remember it, yes.

JUDGE EVANS: Thank you. So it is not a matter of "I do not believe so," is it?

THE WITNESS: No.

* * * * *

Q. At any rate, it was never in cash. It was always in checks?

A. I believe so, yes, sir.

Q. Which is it? You believe so or yes?

A. I think it was checks.

JUDGE EVANS: Do you have any recollection of getting it in cash, green currency?

THE WITNESS: I do not ever remember being handed no cash money, no.

Throughout this and other testimony in response to questions the answer to which were potentially damaging to Trotter, there were long pauses giving Trotter a most unfavorable demeanor.

The General Counsel called Union Secretary-Treasurer and Business Manager Robert J. Parker, who quibbled with the conclusion that Trotter was "hired" by the Union, but admitted that Trotter was paid for picketing one location in Council Bluffs. Parker was not questioned as to the accuracy of the \$4-per-hour figure as the rate of pay for the picketing. In her post-hearing brief, the General Counsel states:

Pursuant to a post-hearing request, the Regional Director for Region 18 received the attached W-2 wage and tax statement forms from the Union. Appendix A is Trotter's income from the Union for calendar quarters II and III in 1976; Appendix B is Trotter's income from the Union for calendar quarter I in 1977.

Appendix A is a statement of \$1,232 paid to Trotter by the Union; Appendix B is \$378.

At \$4 per hour, the \$1,610 total represents 402.5 hours of employment. In my opinion, the likelihood of Trotter's having simply forgotten to report this employment is nonexistent. I find that, as he admitted, he "took it upon [him]self not to do so."

To summarize the above. Trotter stated that Flavorland was the first employment after his discharge by Respondent. Since that was during the month of July 1976, and since General Counsel's admission that the \$1,232 figure was earned partly in the second quarter of 1976, this answer was obviously false. Trotter engaged in a rigid denial of any employment other than at Flavorland Industries, Lackawanna Leather, and Union Packing during the backpay period, including specifically a denial of employment by the Union. He continued in this denial until counsel made clear that he had solid information (the rate of pay) that the denial was false. Then Trotter drew the foil of forgetfulness. However, he admitted being instructed to keep a complete employment history, so his "loss of memory" endured for a far more extensive period than that of his appearance on the witness stand. He testified that he "must have forgot" his employment with the Union; he was totally evasive, or "forgetful," about how much, and when, and how he was paid. He sought to minimize the amount received to explain his forgetfulness by saying "I just worked there long enough to help me, so I could look for a good job"; however, \$1,610 is hardly so paltry a sum that it would escape an honest memory. He admitted taking it upon himself not to report his earnings from the Union to the Board agent who had instructed him to do so; then, while continuing in the obvious fiction that he "forgot" to tell the Board agent about that employment, he acknowledged "I do not know if I would have. I do not know if I would have or would have not" disclosed his earnings had he not been exposed at the hearing.

In fact, he did not. General Counsel, as her brief quoted above reflects, received the W-2 forms from the Union, not Trotter. Thus, this is not the case where an employee admits the concealed earnings at the "11th hour." *Flite Chief, Inc., et al.*, 246 NLRB 407 (1979). It is the case where an employee initiated, and persisted in, an attempt at deception, and constitutes a flagrant abuse of Board processes. Trotter's case is like those distinguished in *Flite Chief*. In *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964), the discriminatee (one Marzano), not only went past the "11th hour" in his failure to disclose interim earnings, he attempted to thwart all attempts at revelation of the truth by evasiveness. (The passages of Trotter's evasiveness quoted above were only representative; no need would be served by repeating the rest.) Trotter's case is also like that of the discriminatee involved in *Jack C. Robinson, d/b/a Robinson Freight Lines*, 129 NLRB 1040 (1960). There, the discriminatee (one Evans) withheld information of interim earnings from illegal liquor sales. The Administrative Law Judge (then "Trial Examiner") disqualified Evans only for the period for which he was actually shown to have made sales. The Board reversed and rejected all of

Evans' claim because it found no reason to believe that the exposed concealment of some interim earnings did not indicate that other interim earnings were similarly concealed, making it impossible to ascertain backpay. That is, as the cases of *McCarthy* and *Robinson*, the concealment practiced by Trotter herein, coupled with his palpable incredibility, makes the ascertainment of his interim earnings impossible, especially in view of his admission that he did not know, or could not "recall," what other information he had failed to supply to the

Board. To determine that any backpay is due Trotter under the circumstances of this case would encourage the abuse of Board processes and thus would not effectuate the policies of the Act.

Accordingly, I find and conclude that no backpay should be awarded to Ferman D. Trotter.

ORDER

It is recommended that the Board adopt the foregoing findings and conclusions.